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Supreme Court, U.S.
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In The
Supreme Court of the United States

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

Petitioner,

versus

MONROE COUNTY, MISSISSIPPI; CHARLES FARMER, M.D., individually; JOHN BEARRY, M.D., individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is recovery for wrongful death authorized under 42 U.S.C. § 1983?

2. In considering an action for wrongful death under 42 U.S.C. § 1983, are courts required by 42 U.S.C. § 1988(a) to apply the common law principle that survivors in a wrongful death action may recover if the wrongful act deprived the deceased of a chance to survive?

3. In a wrongful death action under 42 U.S.C. § 1983, does the court apply state procedural rules regarding standing to sue or does it apply Federal Rule of Civil Procedure 17(a) requiring all actions to be brought by the "real party in interest"?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Sandra Phillips, Petitioner;
2. Jim Waide, Counsel for Petitioner;
3. Monroe County, Mississippi, Respondent;
4. Charles Farmer, M.D., Respondent;
5. John Bearry, M.D., Respondent;
6. L. Bradley Dillard, Counsel for Respondent Monroe County, Mississippi;
7. John L. Clay, Counsel for Respondents Charles Farmer and John Bearry; and
8. Leonard Vincent, Counsel for Respondents Charles Farmer and John Bearry.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment as a matter of law in favor of the Respondents is attached as Appendix A, App. 1. The District Court for the Northern District of Mississippi (Davidson, J.) entered judgment as a matter of law in favor of the Respondents as Appendix C, App. 24, with a separate written opinion. *See* Appendix B, App. 13.

The order of the United States Court of Appeals for the Fifth Circuit denying rehearing is attached as Appendix D, App. 25.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act

or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(a) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

Petitioner Sandra Faye Phillips filed this 42 U.S.C. § 1983 action to recover for the wrongful death of her son, Jonathan Phillips. Her complaint alleges that the death of

Jonathan was caused by the willful indifference of the Respondents (Monroe County, Mississippi, Dr. Charles Farmer and Dr. John Bearry) toward her son's cancer by refusing to provide physician-ordered chemotherapy. Trial Transcript, Vol. I, pp. 1-5. Accordingly, she charged a violation of the Eighth Amendment right to be free from willful indifference to the pain of Jonathan Phillips. *Id.*

Stated in the light most favorable to Petitioner (non-movant), *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), the facts developed at the trial follow.

On June 24, 1998, Jonathan Phillips was in the Monroe County, Mississippi Jail, serving a sentence for aggravated assault. On that date, Jonathan Phillips' physician, oncologist Dr. Julian Hill of Tupelo, Mississippi, wrote the Monroe County Sheriff's Department stating that "Jonathan has recurrent testes cancer and needs to receive salvage chemotherapy – preferably high-dose therapy. . . . " T.T. Vol. I, pp. 20-21. Dr. Hill scheduled the chemotherapy for June 24, 1998 in Tupelo, Mississippi. T.T. Vol. I, pp. 22-23.

Jonathan Phillips' aunt, Diane Hunt, is herself a Monroe County Deputy Sheriff. Hunt attempted to arrange transporting Jonathan for the scheduled chemotherapy to Tupelo, Mississippi. However, the Monroe County Sheriff's Department, through Chief Deputy Burks, informed Hunt that Jonathan could not be transported to Tupelo, Mississippi, for the chemotherapy because the Monroe County Sheriff's Department "didn't have the manpower," T.T. Vol. I, p. 23, and also refused to allow Diane Hunt herself to transport Jonathan to Tupelo, Mississippi, for the chemotherapy. *Id.* at 22-23.

Rather than transporting Jonathan to Tupelo, Mississippi, for the chemotherapy scheduled to begin on June 29, 1998, Monroe County, Mississippi, relieved itself of the expense of treating Jonathan by transferring him to the state correctional facility. Monroe County, Mississippi, made the decision despite its knowledge that Jonathan's physician had ordered chemotherapy to begin on June 29, 1998 in Tupelo, Mississippi. Monroe County, Mississippi, arranged to move Jonathan to the state correctional facility without any assurance that the state had available a facility capable of providing immediate chemotherapy for Jonathan. *See* T.T. Vol. III, pp. 399-405.

On June 29, 1998, the day Jonathan was scheduled to begin his chemotherapy treatment in Tupelo, Mississippi, he was instead transported to the State Department of Corrections facility in Rankin County, Mississippi. The State Department of Corrections had no means of providing immediate chemotherapy. The state would not have accepted Jonathan had its officials known of the need for immediate chemotherapy. T.T. Vol. I, pp. 93, 117-18.

Upon arrival at the state correctional facility, Jonathan learned that he could not receive the immediate chemotherapy and was "terrified." T.T. Vol. III, p. 429. Similarly, Petitioner Sandra Phillips, Jonathan's mother, "fell apart" when informed there was no immediate chemotherapy treatment available. *Id.*

Respondent Dr. Farmer, a staff physician at the Rankin County facility, learned of Jonathan's cancer from Jonathan himself when he conducted Jonathan's intake physical examination. T.T. Vol. III, p. 438. However, Dr. Farmer testified that he could not arrange for Jonathan to begin immediate treatment until July 14, 1998, since it

was necessary for Jonathan to be transferred to the University Medical Center in Jackson, Mississippi, before he could receive the treatment. T.T. Vol. III, p. 452. Dr. Farmer testified that he "did nothing needed to determine how advanced it [Jonathan's cancer] was or to stop the advance of it." T.T. Vol. III, p. 446. Since the correctional facility had no means to treat Jonathan, Dr. Farmer testified there was "nothing he could do." T.T. Vol. I, pp. 33-34.

Similarly, Respondent Dr. Bearry, medical director at the Rankin County, Mississippi correctional facility, testified that the state had no facilities available for immediate chemotherapy and blamed Monroe County, Mississippi, for transferring Jonathan to the state facility. Dr. Bearry testified that the appropriate place to treat such an emergency was locally, T.T. Vol. I, pp. 92-93, and that no chemotherapy was available at any state facility. T.T. Vol. I, pp. 87-88.

In the absence of chemotherapy, the cancer spread to Jonathan's brain, and he died on July 18, 1998, never having received the chemotherapy that was supposed to have begun on June 29, 1998. T.T. Vol. I, pp. 128-29.

The primary defense at trial was lack of a proof of causation. Respondents successfully argued there was no proof Jonathan would have survived even had the prescribed chemotherapy been administered. The defense was buttressed by Jonathan's Tupelo, Mississippi oncologist Dr. Julian Hill, who testified that he could not say that the chemotherapy would have saved Jonathan's life, but only that it would have given him about a thirty to forty percent chance for remission of the cancer. T.T. Vol. II, p. 221.

The district court entered judgment as a matter of law for the Respondents, simply stating that the proof was not sufficient for recovery under Fifth Circuit precedents. T.T. Vol. III, pp. 499-501.

On appeal, the United States Court of Appeals for the Fifth Circuit held that the proof failed because Petitioner had failed to prove causation. The Fifth Circuit held that Petitioner did not prove that beginning the chemotherapy, as prescribed by Dr. Hill on June 29, 1998, would have saved Jonathan's life. While the Fifth Circuit recognized that there is a common law doctrine permitting a plaintiff to recover where a defendant's action deprives him of a "loss of chance" of survival, it held that this common law "loss of chance" doctrine does not apply in 42 U.S.C. § 1983 actions. *Phillips v. Monroe County, Mississippi,* 311 F.3d 369, 375 (5th Cir. 2002), Appendix A, App. 10.

Furthermore, although Respondents did not raise the issue in their briefs, the Fifth Circuit decided that there could be no recovery by either Jonathan for his own suffering or by his mother for her suffering because the action was brought as a "wrongful death action" and not a "survival" action. According to the Fifth Circuit, for these items to be recovered, state law required Petitioner style her pleading as being for "survival" rather than one for wrongful death. 311 F.3d at 373 n. 1.

Believing that the Fifth Circuit's holdings contravene that of other circuits and that there are conflicting and confusing rules regarding wrongful death actions under 42 U.S.C. § 1983, Petitioner requests this Court to accept the case.

REASONS FOR GRANTING WRIT

I. THE WRIT SHOULD BE GRANTED SINCE THE FIFTH CIRCUIT'S REFUSAL TO APPLY THE COMMON LAW PRINCIPLE THAT DIMINISHING ONE'S CHANCES FOR SURVIVAL IS ACTIONABLE CONTRAVENES 42 U.S.C. § 1988(A) WHICH INCORPORATES COMMON LAW PRINCIPLES INTO 42 U.S.C. § 1983.

The United States Court of Appeals for the Fifth Circuit upheld judgment as a matter of law on the grounds that the common law principle allowing wrongful death recovery for a survival does not apply in actions under 42 U.S.C. § 1983. The court said:

> Second, Phillips suggests that she need only prove the defendants' actions increased the Decedent's risk of death due to the cancer. She seems to refer to the "loss of chance" doctrine often applied in medical malpractice contexts. The supporting cases she cites relate to medical malpractice suits and are not relevant here. *See Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 327 (5th Cir. 1991) (declining to expand the "loss of chance" doctrine beyond its normal context of medical malpractice). In conclusion, we find that Phillips failed to prove that any acts or omissions on the part of the defendants caused the Decedent's death, and thus she has failed to prove the elements of her wrongful death claim.

311 F.3d at 375.

However, it is a clear common law principle that one is subjected to liability whenever his unlawful actions diminish the chances of the decedent's survival. *See*, generally, Annotation, *Medical Malpractice: "Loss of*

Chance Causality", 54 A.L.R. 4th 19 (1987). As explained in *Boburka v. Adcock,* 979 F.2d 424 (6th Cir. 1992), "[T]his theory allows a medical malpractice plaintiff to recover if he produces evidence that the defendant physician's malpractice reduced the patient's chances for a better outcome, even if the chance of the better outcome without the physician's negligence was less than fifty percent." 979 F.2d at 429. Courts "are united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice." John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality,* 54 A.L.R. 4th 19 (1987). For example, in *Herskovits v. Group Health Cooperative,* 99 Wash.2d 609, 664 P.2d 474 (Wash.1983), the Washington Supreme Court held that the reduction of a patient's chance for survival from thirty-nine percent to twenty-five percent due to a negligent failure to diagnose his cancer was sufficient proof of causation. *See also James v. United States,* 483 F.Supp. 581, 587 (N.D. Cal.1980) ("[n]o matter how small that chance may have been – and its magnitude cannot be ascertained – no one can say that the chance of prolonging one's life or decreasing suffering is valueless").

By refusing to apply the common law principle that the loss of a chance for survival is actionable, the Fifth Circuit has disregarded *Robertson v. Wegmann,* 436 U.S. 584 (1978). *Robertson* held that state law principles apply in 42 U.S.C. § 1983 actions where there is no applicable federal law unless state law contravenes 42 U.S.C. § 1983's purposes of providing compensation for violations of civil rights and of preventing abuses of power by the state. While *Robertson* dealt with state law regarding "survivorship" rather than state law regarding "wrongful

death," its clear direction is to apply state law in 42 U.S.C. § 1983 actions unless the state law is "inconsistent" with the purposes of 42 U.S.C. § 1983. 436 U.S. at 589-90. The Fifth Circuit had no authority to disregard *Robertson, supra*, nor to disregard *Burnett v. Grattan*, 468 U.S. 42, 58 (1984), which held that where federal laws do not provide an applicable rule, the courts must apply the state rule of decision except where it is shown to be "inconsistent with federal law."

Unlike the Fifth Circuit, other circuits have applied common law or state law to 42 U.S.C. § 1983 actions unless the state law is inconsistent with the purposes of 42 U.S.C. § 1983. *See*, for example, *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (state law is incorporated into 42 U.S.C. § 1983 actions except in cases where it cannot be applied because it would strip plaintiffs of a remedy for violation of federal constitutional rights); *Jaco v. Bloechle*, 739 F.2d 239, 244-45 (6th Cir. 1984); (42 U.S.C. § 1988(a) brings state law into play in 42 U.S.C. § 1983 actions unless state law is "hostile" to the 42 U.S.C. § 1983 action; state law disallowing recovery for wrongful death where death was instantaneous was "hostile" to 42 U.S.C. § 1983); *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983) (state law survivorship rules apply in 42 U.S.C. § 1983 actions except where the state law is inconsistent with the purposes of 42 U.S.C. § 1983).

Thus, other circuits incorporate the laws of the states into 42 U.S.C. § 1983 actions absent evidence the state law is "inconsistent" with or "hostile" to 42 U.S.C. § 1983 actions.

Yet another approach is taken by the Eighth and Tenth Circuits. Those circuits do not apply state law

wrongful death law at all. Instead, they recognize a federal remedy under 42 U.S.C. § 1983 for wrongful death, with that federal remedy then *incorporating state damages rules*. In *Andrews v. Neer*, 253 F.3d 1052, 1063 (8th Cir. 2001), the court wrote:

> Andrews argues that surviving family members should be allowed to collect damages on their own behalf in a § 1983 claim for the wrongful death of another. We previously have declined to decide this question. . . . Andrews points out, correctly, that the circuit courts of appeal disagree regarding the availability of such damages under § 1983. In *Berry v. City of Muskogee*, 900 F.2d 1489, 1506 (10th Cir. 1990), the Tenth Circuit held that the court could not supplement the damages available to the plaintiff under the state survival statute with those available under the state wrongful death statute. The court reasoned that the wrongful death statute allowed collection of damages for items that the "decedent could not have recovered had he lived to sue for himself," such as loss of companionship and grief. *Id.* Thus, the court concluded that borrowing the damages available in the wrongful death statute would be "inconsistent with the predominance of the federal interest," and therefore would fail to satisfy the § 1988 criteria for borrowing state law. *Id.* The court concluded by outlining a federal remedy to be applied in § 1983 death cases that included compensatory damages such as medical and burial expenses, pain and suffering before death, loss of earnings based on the probable duration of the victim's life, the victim's loss of consortium, and other *damages recognized in such common-law tort* actions. *See id.* at 1506-07.

> The Fifth Circuit stands opposite the Tenth Circuit in its treatment of the damages available to a plaintiff in a § 1983 death case.
>
> . . .
>
> Our careful consideration of the competing arguments on this issue leads us to conclude that the approach of the Tenth Circuit, as set forth in *Berry*, represents the correct assessment of the damages available in § 1983 death cases.

253 F.3d at 1063 (emphasis added).

In short, the courts of appeals have three different approaches to 42 U.S.C. § 1983 actions for wrongful death. The Fifth Circuit Court of Appeals recognizes state law actions for wrongful death but refuses to recognize the common law principle that the loss of a chance to survive is actionable. The Second, Sixth and Seventh Circuits apply state rules of decision unless it is shown that the state rules are "hostile" to or "inconsistent" with federal law. The Eighth and Tenth Circuits do not incorporate state wrongful death statutes into 42 U.S.C. § 1983 at all but hold that there is a federal right to recover damages for wrongful death under 42 U.S.C. § 1983, and the damages for such action are measured by state law damages rules. This Court should accept this case to determine which approach is correct.

II. THE FIFTH CIRCUIT REFUSED TO FOLLOW PRECEDENTS OF THIS COURT BY DECIDING SANDRA PHILLIPS DID NOT HAVE "STANDING" TO SUE BASED UPON STATE PROCEDURAL RULES RATHER THAN FOLLOWING THE FEDERAL RULES OF CIVIL PROCEDURE.

Besides claiming damages for the wrongful death of Jonathan Phillips, Sandra Phillips (Jonathan's mother) sued for her own pain and suffering when she witnessed Jonathan being denied the chemotherapy treatment. According to the proof at trial, Sandra Phillips "fell apart" when learning that the state would not adhere to the doctor's orders to provide chemotherapy to her son. T.T. Vol. III, p. 429. The Fifth Circuit Court of Appeals declined recovery because of its interpretation of state procedures. It found that Phillips had brought the action as a "wrongful death" action rather than as a "survival action," and Sandra Phillips lacked "standing" to sue for Jonathan's suffering or her own under this type action. 311 F.3d at 373 n. 1.

In this holding, the Fifth Circuit runs afoul of fundamental rules. *Hanna v. Plumer*, 380 U.S. 460 (1965) held that if one of the Federal Rules of Civil Procedure addresses an issue, that rule, not any procedural rule of state law, must apply. According to *Hanna*: "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." 380 U.S. at 471. Here, the Federal Rules of Civil Procedure provide that an action in federal court is to be brought by the

name of the real party in interest. Fed. R. Civ. P. 17(a). Since Sandra Phillips herself suffered fright and pain when her son was refused chemotherapy, she was the "real party in interest" and the appropriate party to bring the action. By refusing to follow Fed. R. Civ. P. 17(a) and, instead, deciding the issue by looking to hypertechnical state law distinctions between "survivorship" and wrongful death actions, the Fifth Circuit Court of Appeals has contravened *Hanna, supra*. Other circuits accept the principle that one may sue for violations of his own rights in federal court where the unconstitutional killing of another has injured him. *See League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984) or *O'Mally v. Brierley*, 477 F.2d 785, 790 (3d Cir. 1973). *See also Coggins v. Carpenter*, 468 F.Supp. 270, 282 (D.C. Pa. 1979) ("a person has standing to assert claims under 42 U.S.C. § 1983 if that person was aggrieved or injured by the conduct, even if that person was not the object of the conduct allegedly in violation of 42 U.S.C. § 1983").

Because the Fifth Circuit has looked to state procedural rules in determining the standing to bring this cause of action, rather than following the clear direction of Fed. R. Civ. P. 17(a), the writ should be granted.

CONCLUSION

The Fifth Circuit Court of Appeals in this case correctly noted the disagreement among the circuits on the important issues of recovery for wrongful death under 42 U.S.C. § 1983. The Fifth Circuit wrote:

> Wrongful death recovery under § 1983 has 'generated considerable confusion and disagreement.' . . . The Supreme Court has not yet addressed this issue, and, while the circuits are divided over whether such recovery is appropriate, we have consistently allowed it. . . .

Similarly, M. Schwartz and J. Kirklin, *Section 1983 Litigation Claims, Defenses and Fees*, § 11.3 (1986) observes:

> Whether one person may assert a § 1983 claim for damages resulting from the wrongful death of another is a subtle and complex question that has given the courts much difficulty and generated considerable confusion. The issue potentially calls into play principles of federal constitutional law, §§ 1983 and 1998, and state wrongful death statutes. The Supreme Court has yet to resolve it.

Respectfully submitted,

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SANDRA FAY PHILLIPS, on Behalf of the
Wrongful Death Beneficiaries of Jonathan Phillips,

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versus

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMER, M.D., individually;
JOHN BEARRY, M.D., individually,

Respondents.

APPENDIX

APPENDIX A

311 F.3d 369

United States Court of Appeals,
Fifth Circuit.

Sandra Fay PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan PHILLIPS,
Plaintiff-Appellant,
v.
MONROE COUNTY, MISSISSIPPI; Charles Farmer, Dr., individually; John Bearry, individually,
Defendants-Appellees.

No. 01-60425.

Oct. 28, 2002.
Order Denying Rehearing Dec. 9, 2002.

Jim D. Waide, III (argued), Kristy Lynn Bennett, Waide & Associates, Tupelo, MS, for Plaintiff-Appellant.

John Samuel Hill, Lamar Bradley Dillard (argued), Mitchell, McNutt & Sams, Tupelo, MS, for Monroe County, MS.

John Lewis Clay (argued), Jackson, MS, Leonard Charlton Vincent, Mississippi Dept. of Corrections, Parchman, MS, for Farmer and Bearry.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WIENER, EMILIO M. GARZA, and PARKER, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Sandra Fay Phillips, the plaintiff, appeals the district court's judgment as a matter of law in favor of Monroe

County, Mississippi, Dr. Charles Farmer, and Dr. John Bearry (collectively "the defendants"), in this wrongful death suit brought under 42 U.S.C. § 1983. Phillips's son, Jonathan Phillips (the Decedent), died from testicular cancer while serving a sentence for aggravated assault in the Mississippi prison system. Phillips claims the defendants wrongfully caused the Decedent's death in violation of the Eighth and Fourteenth Amendments to the United States Constitution by refusing to provide the Decedent with necessary medical care. Additionally, Phillips brought a state law negligence claim against Monroe County. Using the standard announced in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), we affirm, because the plaintiff failed to prove the necessary causal link between the Decedent's death and the acts or omissions of the defendants. Additionally, the state law claim against Monroe County is barred by § 11-49-9(1)(m) of the Mississippi Code.

Most of the relevant facts surrounding this case are undisputed. The Decedent was diagnosed with widespread testicular cancer, including disease in the lymph nodes, abdominal cavity and lungs, in September 1996. He underwent surgery and chemotherapy, and was pronounced in remission within six months. In 1997, the Decedent's cancer returned, he completed three more rounds of chemotherapy, and was again found to be in remission. Before he was diagnosed with cancer, the Decedent was involved in a fight, for which he was later arrested and charged with aggravated assault. He pled guilty and was sentenced to 20 years imprisonment, with 15 years suspended. The Decedent began serving his sentence on May 15, 1998, when he was taken into custody by the Monroe County Sheriff's Department (the "Sheriff's Department"). Soon thereafter, he began complaining

of chest pains, shortness of breath, headaches, and spitting up blood. Upon learning of his symptoms, the Decedent's family immediately contacted his oncologist, Dr. Julian Hill. Dr. Hill was located in Tupelo, Mississippi. Due to the distance between the jail and Dr. Hill's office, Dr. Hill instructed the Sheriff's Department to take the Decedent to a local physician for blood work. After reviewing the results of the blood tests, Dr. Hill insisted the Decedent be brought to him for further tests. The Sheriff's Department complied, and the Decedent had more extensive tests, including CT scans, on June 24th. Dr. Hill found that the Decedent's cancer had reappeared in his lungs and spread to his spleen, and Dr. Hill advised the Decedent's family and the Sheriff's Department that the Decedent needed to receive salvage chemotherapy immediately and that it should begin no later than June 29th.

For reasons that are disputed and not relevant to our analysis, the Sheriff's Department sought to have the Decedent transferred to the state prison system to receive his chemotherapy treatments. It first attempted to have the sentencing court modify the Decedent's sentence so that he could be under house arrest during his treatment, but the judge found he was without jurisdiction to do so. Monroe County's Chief Deputy next contacted Dr. John Bearry, the Medical Director at the Mississippi State Penitentiary at Parchman, to determine what steps should be taken to transfer the Decedent given his medical needs. Dr. Bearry's office advised the Sheriff's Department to immediately transfer the Decedent from the Monroe County jail to the Central Mississippi Correctional Facility in Rankin County. The Decedent was transferred on June 29, and Dr. Charles Farmer, a staff physician, gave the Decedent a standard intake physical exam and referred

the Decedent to the University Medical Center in Jackson for cancer treatment. The prisoner referral process is time-consuming, but Dr. Farmer managed to schedule an appointment for the Decedent for July 14.

On July 1, the Decedent suffered abdominal pain and began vomiting. He was sent to the emergency room at the University Medical Center, diagnosed with pneumonia, given antibiotics, and returned to the prison. Eight days later, the Decedent began having seizures and fell unconscious in his cell. He was immediately transported to the University Medical Center, where he was diagnosed with a brain tumor. The Decedent's treating physicians at the Center, including Dr. James Thigpen, concluded that the testicular cancer had metastasized to the Decedent's brain, and they prescribed immediate aggressive radiation therapy. The treating physicians felt that chemotherapy would not have been an effective therapy for the brain tumor. Despite the radiation treatments, the Decedent died on July 18, 1998, and his death certificate lists the cause of death as herniation of the brain due to cancer.

Phillips subsequently brought this action on behalf of the wrongful death beneficiaries of the Decedent, alleging that his death was due to Monroe County's refusal to provide necessary medical care and failure to have policies providing for medical treatment for those prisoners in need of medical care. The complaint was later amended to include Dr. Bearry and Dr. Farmer, individually, for gross negligence and willful indifference to the Decedent's rights, alleging that they were deliberately indifferent to the Decedent's medical needs because they failed to provide him with the immediate course of chemotherapy prescribed by Dr. Hill. After Phillips presented her case, the defendants moved for judgment as a matter of law. The

district court granted the motion on all grounds, finding that the defendants were not deliberately indifferent to the Decedent's medical needs, and thus did not violate his constitutional rights, and that the state law claim against Monroe County was barred because Mississippi had not waived its sovereign immunity in this circumstance.

We review a district court's ruling on a motion for judgment as a matter of law *de novo. Industrias Magromer Cueros y Pieles S.A. v. Louisiana Bayou Furs Inc.,* 293 F.3d 912, 918 (5th Cir.2002). Federal Rule of Civil Procedure 50(a) states that a court should render a judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." In *Reeves v. Sanderson Plumbing Products, Inc.,* the Supreme Court clarified the approach a court should use when granting a judgment as a matter of law. First, we must review the record "taken as a whole." 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (internal citation omitted). Second, in reviewing all of the evidence in the record, we must "draw all reasonable inferences in favor of the nonmoving party" and "not make credibility determinations or weigh the evidence." *Id.* In other words, we must give credence to the evidence supporting the nonmovant as well as any evidence supporting the moving party that is uncontradicted, unimpeached, and not attributable to interested witnesses. *Id.* at 151, 120 S.Ct. 2097.

Section 1983 provides a cause of action for persons who are subjected to the deprivation of any constitutional right by a person acting under the color of state or federal law. Although Phillips brings this suit in federal court under § 1983, she is not alleging that her constitutional

rights were violated. Likewise, she does not seek relief as the personal representative of the Decedent's estate.[1] In other words, Phillips is not suing to redress her own § 1983 claims or any constitutional claims the Decedent

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[1] We have carefully reviewed the record for any evidence that this suit was brought as a survival action because such actions, which are very similar to wrongful death suits, are also available under § 1983. *See Moor v. County of Alameda,* 411 U.S. 693, 702-03 n. 14, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) ("[P]ursuant to § 1988 state survivorship statutes which reverse the common-law rule may be used in the context of actions brought under § 1983."); *Brazier v. Cherry,* 293 F.2d 401, 406-07 (5th Cir.1961) (incorporating both a state's survival statute and its wrongful death statute to provide full remedies for § 1983 violations). We pause at this point to emphasize the importance of the distinction between survival and wrongful death causes of action. If Phillips had brought this suit as a survival action, the causation analysis would be different because that type of claim redresses any constitutional injuries suffered by the Decedent *before* his death.

The record is somewhat ambiguous in this regard. The captions of both the original and amended complaint conspicuously refer to the Phillips family as wrongful death beneficiaries; the facts alleged characterize the suit as a wrongful death claim; and the parties, as well as the court, repeatedly refer to the case as a wrongful death suit. On the other hand, the types of damages sought by Phillips suggest she might have meant to bring both wrongful death and survival actions. Importantly, however, Phillips never refers to herself or any of the plaintiffs as personal representatives of the Decedent's estate, nor does she clearly assert that she is in fact the Decedent's executor or administrator. Under Mississippi's general survivorship statute, only executors, administrators, and temporary administrators may bring a survival action.

Miss.Code Ann. § 91-7-233 (1994). Thus, without alleging the appropriate legal status, Phillips could not have brought a survival action. *See Berryhill v. Nichols,* 171 Miss. 769, 158 So. 470, 471 (1935) (holding that recovery for pain and suffering of deceased allegedly caused by the negligence of doctor can only be had in suit by personal representative and not by next of kin or heirs at law). Because Phillips could only have brought this suit as a wrongful death claim, we do not address the merits of a survival action.

might have had prior to his death. Instead, Phillips sues on behalf of the wrongful death beneficiaries of the Decedent. She seeks to recover for the injuries the Phillips family suffered as a result of the Decedent's death, which, in turn, was allegedly caused by the defendants' violation of the Decedent's constitutional rights.

Wrongful death recovery under § 1983 has "generated considerable confusion and disagreement." *Rhyne v. Henderson County,* 973 F.2d 386, 390 (5th Cir.1992) (quoting *Crumpton v. Gates,* 947 F.2d 1418, 1420 (9th Cir.1991)). The Supreme Court has not yet addressed this issue, and, while the circuits are divided over whether such recovery is appropriate, we have consistently allowed it. *See Rhyne,* 973 F.2d at 390-91 (summarizing the line of cases permitting such recovery); *Brazier,* 293 F.2d at 406-07.

Wrongful death statutes create new causes of action on behalf of the statutorily-designated persons in order to compensate them for the death of the decedent. *See, e.g., Thames v. Mississippi ex rel. Shoemaker,* 117 F.2d 949, 951 (5th Cir.1941) (holding that Mississippi's wrongful death statute creates an independent cause of action). Unlike a survival action, a wrongful death action cannot be maintained unless the defendant's conduct is the cause of the decedent's death. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 4:67 (4th ed., 2001 update). Accordingly, a plaintiff seeking to recover on a wrongful death claim under § 1983 must prove both the alleged constitutional deprivation required by § 1983 and the causal link between the defendant's unconstitutional acts or omissions and the death of the victim, as required by the state's wrongful death statute.

We decline to address whether Phillips proved any constitutional violations on the part of the defendants because no reasonable jury could have found for Phillips on the wrongful death causation issue. Reviewing the entire record and drawing all reasonable inferences in favor of Phillips, we find the evidence is uncontradicted that, even if the defendants arranged for the Decedent to begin chemotherapy on June 29th, as recommended by Dr. Hill, such action would not have prevented the Decedent's death.

The Decedent's death certificate lists the cause of death as "brain herniation" due to the metastatic testicular cancer. At trial, the Decedent's aunt testified that the treating physician explained to the Phillips family that the Decedent's death was caused when the brain tumor swelled so much that it herniated his brain. Dr. Thigpen, a disinterested witness, testified that the Decedent's death was a direct result of the cancer's metastasis to the brain and that chemotherapy would not have influenced the brain tumor in any way. His uncontradicted testimony was that chemotherapy is not an effective treatment for brain tumors because the drugs do not pass into the brain. Phillips confirmed during her testimony that the doctors had advised the family that chemotherapy would be ineffective. Dr. Thigpen also testified that the cancer did not spread to the brain because of the delay in initiating chemotherapy. In his opinion, the cancer had spread to the brain about six months before the Decedent passed away.

It is also undisputed that Dr. Hill, the Decedent's treating physician, had only the Decedent's chest, abdomen, and pelvis scanned in late June. No CT scan was done of the Decedent's brain prior to the onset of his seizures on July 9. Dr. Hill further admitted at trial that,

even with the salvage chemotherapy he had prescribed, the Decedent could, at most, have hoped for a thirty to forty percent chance of some temporary remission of his cancer. Finally, on July 1, when the Decedent was admitted to the emergency room and diagnosed with pneumonia, the doctors at the Medical Center performed a thorough neurological exam, and the results were normal. Dr. Thigpen's undisputed testimony at trial was that no physician would have had any reason to order a brain scan or radiation therapy until appropriate symptoms appeared. The Decedent's seizure on July 9 is the only evidence in the record of such symptoms, and it was immediately after this event that the correctional facility transferred the Decedent to the University Medical Center for appropriate treatment. In sum, there is no evidence in the record of any possible medical treatment that Monroe County or the individual defendants could have provided to save the life of the Decedent.

Phillips argues in her brief that it is not necessary for her to prove chemotherapy would have saved the Decedent's life. First, she refers to the fright and anxiety both she and the Decedent suffered because of the delay in chemotherapy. In this regard, Phillips confuses the causation issue. In a survival action, damages for the Decedent's physical suffering and mental anxiety as a result of the alleged deprivation of medical care would have been appropriate. In a wrongful death context, however, no damages are available until the plaintiff has cleared the causation hurdle. *See Wilks v. Am. Tobacco Co.*, 680 So.2d 839, 842 (Miss.1996) (holding that plaintiff's failure to prove decedent's death was caused by the wrongful acts of the defendant precludes any recovery of wrongful death damages under Mississippi's wrongful death statute).

Second, Phillips suggests that she need only prove the defendants' actions increased the Decedent's risk of death due to the cancer. She seems to refer to the "loss of chance" doctrine often applied in medical malpractice contexts. The supporting cases she cites relate to medical malpractice suits and are not relevant here. *See Bach v. Trident Steamship Co., Inc.,* 920 F.2d 322, 327 (5th Cir.1991) (declining to expand the "loss of chance" doctrine beyond its normal context of medical malpractice). In conclusion, we find that Phillips failed to prove that any acts or omissions on the part of the defendants caused the Decedent's death, and thus she has failed to prove the elements of her wrongful death claim.

Phillips also appeals the district court's judgment as a matter of law for Monroe County on the state law negligence claim. Mississippi waives sovereign immunity for itself and its political subdivisions in § 11-46-5 of the Mississippi Code, but subjects this blanket waiver to numerous exceptions, including those listed in § 11-46-9. In pertinent part, § 11-46-9 provides:

> (l) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed.

Miss.Code Ann. § 11-46-9(1)(m) (Supp.2001). In *Sparks v. Kim,* 701 So.2d 1113, 1114 (Miss.1997), the Mississippi Supreme Court applied this exception to a wrongful death

claim. Thus, § 11-49-9(1)(m) bars Phillips's state law negligence claim against Monroe County.

Phillips asserts in her brief that this provision is unconstitutional on the grounds that it violates the Equal Protection clause of the Fourteenth Amendment by denying equal protection to prisoners. We find that Phillips waived the constitutionality issue by failing to present it in either her original or amended complaint, as well as by failing to include it in the pretrial order.[2] *See Elvis Presley Enters., Inc. v. Capece,* 141 F.3d 188, 206 (5th Cir.1998) (holding that claims or issues omitted from the pretrial order are waived, even if they appeared in the complaint); *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325, 1332 (5th Cir.1994) (holding that it is inappropriate to reach constitutional issues when a case can be decided on other grounds).

For these reasons, we find that the district court properly found for the defendants on all claims and the judgment as a matter of law is AFFIRMED.

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[2] Nor does the constitutional challenge appear to have merit. Prisoners are not a suspect or quasi-suspect class, and the Mississippi Supreme Court has already identified a legitimate state interest for § 11-46-9(1)(m) that more than meets the burden of rationality review. *See Sparks,* 701 So.2d at 1116 (finding that the statute protects the state's ability to hire competent prison personnel).

ON PETITION FOR REHEARING

Before WIENER and EMILIO M. GARZA, Circuit Judges.*

IT IS ORDERED that the petition for rehearing is DENIED.

The petitioner suggests that the Court erred by ruling *sua sponte* that her wrongful death cause of action brought under 42 U.S.C. § 1983 could not stand because she failed to prove that the defendants caused the decedent's death. We note that the defendants did address the causation issue both at trial and in their briefs. *Carmon v. Lubrizol,* 17 F.3d 791, 794 (5th Cir.1994) (this Court liberally construes briefs in determining issues presented for review). Moreover, we may affirm the district court's decision on any grounds supported by the record. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.,* 245 F.3d 507, 511 (5th Cir.2001). The petitioner also argues that our holding is flawed because it does not explain why she was not allowed to recover for her own pain and suffering. The petitioner is correct that one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action. The petitioner, however, failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the petitioner's rights.

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* Judge Parker was a member of the original panel but retired from the court on November 1, 2002, and, therefore did not participate in the petition for rehearing. This order is being entered by a quorum of this court pursuant to 28 U.S.C. Section 46(d).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA FAYE PHILLIPS,
on behalf of the wrongful death
beneficiaries of Johnathan
Phillips — PLAINTIFF

vs. — No. 1:98-CV313-D-D

MONROE COUNTY,
MISSISSIPPI; DR. CHARLES
FARMER; and DR. JOHN
BEARRY — DEFENDANTS

BENCH OPINION

(Filed May 1, 2001)

Presently before the court is the Defendants' motion for judgment as a matter of law, pursuant to rule 50(a)(1) to the Federal Rules of Civil Procedure. Upon due consideration, the court finds that the motion should be granted.

A. Factual and Procedural Background

On April 23, 2001, this case came before the court for jury trial. At the conclusion of the Plaintiff's case, the Defendants moved for judgment as a matter of law, pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure. After viewing all the evidence presented in the light most favorable to the Plaintiff, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiff on any of her claims. As such, the court shall grant the Defendants' motion.

In this action, the Plaintiff asserts two causes of action against the Defendant Monroe County, Mississippi, one cause of action against Dr. Farmer, and one cause of action against Dr. Bearry. Specifically, the Plaintiff claims, pursuant to 42 U.S.C. § 1983, that all three of the Defendants wrongfully caused the death of her son, state inmate Johnathan Phillips (the Decedent), in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Further, the Plaintiff brings a state law negligence claim against Monroe County, in connection with the same events.

The underlying facts concerning the course of the Decedent's medical treatment while he was incarcerated are largely undisputed. On May 12, 1998, the Decedent, a nineteen-year-old testicular cancer survivor, was sentenced to a term of five years in a Mississippi Department of Corrections facility following his entry of a guilty plea to a charge of aggravated assault. On May 15, 1998, the Decedent, a resident of Monroe County, reported to the Monroe County Jail to begin serving his state prison sentence. Shortly thereafter, he began complaining of chest pains, shortness of breath, headaches, and spitting up blood. Upon hearing of this, the Decedent's family contacted Tupelo oncologist Dr. Julian Hill, who advised the family members to contact someone at the Monroe County Sheriff's Department and notify them of the Decedent's need for immediate medical treatment. Pursuant to Dr. Hill's instructions, the Monroe County Sheriff's Department transported the Decedent to and from four medical appointments, two with Dr. Hill in Tupelo, and two with Dr. Woodie Herron in Aberdeen. After blood tests and a CAT scan revealed that the Decedent's cancer had reappeared, Dr. Hill advised that the Decedent needed to begin chemotherapy immediately.

Following an unsuccessful attempt to have the sentencing state Circuit Judge modify the Decedent's sentence so as to allow house arrest, Monroe County's Chief Deputy contacted Defendant Dr. Bearry, who was the Medical Director at the Mississippi State Penitentiary at Parchman, to determine what steps should be taken. Bearry's office advised that the Decedent, who was a state prisoner, should be immediately transferred from the Monroe County Jail to the Central Mississippi Correctional Facility in Rankin County. The Decedent was so transferred on June 29, 1998, and was given an intake physical exam at the Central Mississippi Correctional Facility on July 1, 1998, by Defendant Dr. Farmer, a staff physician, who referred the Decedent to the University Medical Center in Jackson for treatment. Ordinarily, the prisoner referral process is quite time-consuming, and it often takes as long as eight weeks for a prisoner to be seen at the Medical Center. At Dr. Farmer's insistence, however, the Medical Center gave the Decedent an appointment for July 14, 1998.

On the night of July 1, 1998, after his intake physical, the Decedent began suffering from abdominal pain and vomiting. As a result, he was sent to the emergency room at the University Medical Center where he was diagnosed with pneumonia, and given antibiotics. Thereafter, on July 9, 1998, the Decedent fell unconscious in his prison cell and was immediately transported from the Rankin County facility to the University Medical Center. At the Medical Center, he was diagnosed with a brain tumor, with the

Center's physicians[1] concluding that the Decedent's testicular cancer had metastasized in his brain. It was this tumor that posed the greatest and most immediate threat to the Decedent. Dr. Thigpen, and the Center's other physicians, concluded that immediate aggressive radiation therapy was necessary. Chemotherapy, according to Dr. Thigpen's testimony, would not have been an effective treatment for the Decedent's brain tumor. Accordingly, the Decedent received radiation therapy for his brain tumor. In spite of these efforts, the Decedent expired nine days later, on July 18, 1998, while at the Medical Center. The Decedent's Death Certificate specifies the cause of death as hemorrhage of the brain due to cancer.

B. Standard

Rule 50(a)(1) of the Federal Rules of Civil Procedure sets forth the standard for granting judgment as a matter of law:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be

[1] One of the Decedent's treating physicians was Dr. James Thigpen, who was allowed to testify out-of-turn during the trial of this cause. Although Dr. Thigpen was called out-of-turn and therefore testified during the Plaintiff's case-in-chief, his testimony was a part of the record before the court, and would have in any event been properly considered by the court at the conclusion of the trial.

> maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

In applying this standard, the court must consider all of the evidence in the light most favorable to the nonmovant, drawing all reasonable factual inferences in that party's favor, and leaving credibility determinations and the weighing of evidence to the jury. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 149-50, 120 S.Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000); *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969); *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 222 (5th Cir. 2000). The court should grant a motion for judgment as a matter of law only when "the facts and inferences point so strongly and overwhelmingly in favor of [the moving] party that the court believes that reasonable [jurors] could not arrive at a contrary verdict." *Boeing Co.,* 411 F.2d at 374.

C. Discussion

To determine whether entry of judgment as a matter of law against the Plaintiff is appropriate, the court must ascertain if sufficient evidence exists for a reasonable jury to find that the Defendants violated the Decedent's rights under the Eighth amendment to the United States Constitution, and whether Monroe County was negligent in its treatment of the Decedent.

1. The Plaintiff's § 1983 Claims

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted." The United States Supreme Court has held that the Eighth Amendment's "cruel and unusual punishments" clause imposes a duty on prison officials to ensure that prisoners receive adequate food, clothing, shelter, and medical care. *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994).

Along this line, inadequate medical care by a prison official or doctor can result in a constitutional violation for purposes of a § 1983 claim when the official or doctor's conduct amounts to "deliberate indifference to [the prisoner's] serious medical needs, constituting the unnecessary and wanton infliction of pain proscribed by the eight Amendment." *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L. Ed. 2d 251 (1976); *Stewart v. Murphy,* 174 F.3d 530, 533-34 (5th Cir. 1999). The Supreme Court, in *Farmer,* defined the "deliberate indifference" standard, explaining that a prison official or doctor is not liable unless he "knows of and disregards an excessive risk to inmate health or safety." *Farmer,* 511 U.S. at 837; *Stewart,* 174 F.3d at 534. Further, although inadequate medical treatment may at a certain point rise to the level of deliberate indifference, medical malpractice or negligent care do not. *See Stewart,* 174 F.3d at 533 ("Deliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the conscience of mankind.").

The heart of the Plaintiff's § 1983 claims is that the Defendants' conduct toward the Decedent constituted deliberate indifference to his serious medical needs. Specifically, the Plaintiff asserts that the Defendants' failure to provide chemotherapy for the treatment of the Decedent's testicular cancer met this standard. The court

finds, however, that neither Monroe County nor Drs. Farmer or Bearry acted with deliberate indifference to the Decedent's medical needs.

As for Monroe County's treatment of the Decedent, it is undisputed that the Decedent received transportation to and from four medical appointments while he was incarcerated in the Monroe County Jail, including two visits to Dr. Hill's office in Tupelo; the Decedent also received all prescribed medication in a timely fashion while he was incarcerated in Monroe County. Further, once Monroe County was told by the Department of Corrections that the Decedent was to be immediately transferred to the Central Mississippi Correctional Facility, Monroe County's Chief Deputy contacted the state facility and attempted to ensure that state personnel knew of the Decedent's cancer, and that the Decedent would receive prompt emergency medical treatment. Thereafter, the Monroe County Deputy that transferred the Decedent to the state facility took the Decedent's medical records and hand-delivered them to officials at the state facility. And, despite the Plaintiff's assertion that Monroe County should not have agreed to transfer the Decedent to the Central Mississippi Correctional Facility, state inmates such as the Decedent do not have the right to be incarcerated in a county jail. Miss. Code Ann. § 47-5-110; *see Micolaou v. Mississippi,* 596 So. 2d 863, 864-65 (Miss. 1992) ("The Mississippi Department of Corrections is vested with . . . the discretion to decide which of its institutions or facilities is appropriate for an offender.").

Following the Decedent's transfer to the Central Mississippi Correctional Facility on June 29, 1998, Monroe County had no further control over the medical care he received. And, in connection with that treatment, one of

the Decedent's treating physicians, Dr. Thigpen, testified that chemotherapy during the months of June or July of 1998 would not have been an effective treatment for the Decedent's condition because the Decedent's testicular cancer had began metastasizing in his brain as early as January of 1998. And, as previously noted, chemotherapy is not an effective treatment once cancer enters the brain.

As such, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that Monroe County acted with deliberate indifference, as that term has been defined by the Supreme Court and the Fifth Circuit, to the Decedent's serious medical needs.

Dr. Bearry, the Medical Director at the Mississippi Sate Penitentiary at Parchman, was not one of the Decedent's treating physicians. In fact, he never had any contact whatsoever with the Decedent. It was his office, however, as a subdivision of the Department of Corrections, that instructed Monroe County to transfer the Decedent to the Central Mississippi Correctional Facility, which is the only state penal institution located near a medical center that provides chemotherapy. All state inmates that suffer from cancer and are in need of chemotherapy or similar treatment are housed at the Central Mississippi Correctional Facility due to its proximity to the University of Mississippi Medical Center.

The court finds that there is no evidence suggesting that Dr. Bearry knew of the Decedent's grave condition and responded with deliberate indifference. In fact, Dr. Bearrys' office instructed Monroe County to transfer the Decedent to the only state facility where the Decedent could receive treatment for his condition. As such, the

court finds that Dr. Bearry is entitled to judgment as a matter of law on the Plaintiff's claim against him.

Dr. Farmer, unlike Dr. Bearry, did actually see the Decedent, and gave him a physical upon his arrival at the Central Mississippi Correctional Facility on July 1, 1998. As a result of that physical, Dr. Farmer referred the Decedent to the University Medical Center for treatment; Dr. Farmer subsequently had no further contact with the Decedent, and had no further control over the medical care the Decedent received. The Medical Center gave the Decedent an appointment for July 14, 1998. As noted above, however, the Decedent was actually admitted to the Medical Center on July 9, 1998, where he remained until his death on July 18, 1998. During that time, Dr. Farmer had no control over the Decedent's medical care. Therefore, as is the case with Monroe County and Dr. Bearry, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that Dr. Farmer acted with deliberate indifference to the Decedent's serious medical needs.

2. The Plaintiff's State Law Negligence Claim

The State of Mississippi waives sovereign immunity for itself and its political subdivisions in section 11-46-5 of the Mississippi Code, which provides that:

> [T]he immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived . . .

Miss. Code Ann. § 11-46-5(1) (Supp. 2000). This waiver of sovereign immunity, however, is subject to numerous exceptions. Several of these exceptions are set forth in section 11-46-9 of the Mississippi Code, which provides, in pertinent part, that:

> (l) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed.

Miss. Code Ann. § 11-46-9 (l)(m) (Supp. 2000). Further, the Mississippi Supreme Court has held that this exception applies to wrongful death claims, as well as negligence claims. *Sparks v. Kim,* 701 So. 2d 1113, 1114 (Miss. 1997).

Here, it is undisputed that the Decedent was an inmate of a jail or penitentiary at the time of his death. As such, the Plaintiff's negligence claim against Monroe County is effectively barred by section 11-46-9(l)(m) of the Mississippi Code. Monroe County, therefore, is entitled to an entry of judgment as a matter of law on the Plaintiff's state law negligence claim.

D. Conclusion

In sum, the court finds that judgment as a matter of law should be granted in favor of the Defendants as to all of the Plaintiff's claims.

As to the Plaintiff's state law negligence claim against Monroe County, the court finds that section 11-46-9 (l)(m) of the Mississippi Code bars any such claims.

As to the Plaintiff's § 1983 claims, the court finds that there is no legally sufficient evidentiary basis for a reasonable jury to find that any of the Defendants acted with deliberate indifference to the Decedent's serious medical needs. There is no evidence that the Decedent was deliberately ignored or maltreated or that any of the Defendants committed willful wrongs or malicious acts. *See Stewart*, 174 F.3d at 532. As such, the court holds that the Defendants' motion for judgment as a matter of law pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure should be granted.

A separate judgment and order in accordance with this opinion shall issue this day.

This the 9th day of May 2001.

/s/ Glen H. Davidson
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA FAYE PHILLIPS,
on behalf of the wrongful death
beneficiaries of Johnathan Phillips — PLAINTIFF

vs. — No. 1:98CV313-D-D

MONROE COUNTY,
MISSISSIPPI; DR. CHARLES
FARMER; and
DR. JOHN BEARRY — DEFENDANTS

JUDGMENT AND ORDER GRANTING MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to a bench opinion issued on April 26, 2001, and supplemented this day by written opinion, it is hereby ORDERED that

(1) the Defendants' motion for judgment as a matter of law, pursuant to Rule 50(a)(1) of the Federal Rules of Civil Procedure, is GRANTED; and

(2) JUDGMENT is entered in favor of the Defendants on all of the Plaintiff's claims.

SO ORDERED, this the 9th day of May 2001.

/s/ Glen H. Davidson
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

Plaintiff-Appellant,

versus

MONROE COUNTY, MISSISSIPPI; CHARLES FARMER, DR, individually; JOHN BEARRY, individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING

(Filed Dec. 9, 2002)

Before WIENER and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

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* Judge Parker was a member of the original panel but retired from the court on November 1, 2002, and, therefore did not participate in the petition for rehearing. This order is being entered by a quorum of this court pursuant to 78 U.S.C. Section 46(d).

The petitioner suggests that the Court erred by ruling *sua sponte* that her wrongful death cause of action brought under 42 U.S.C. § 1983 could not stand because she failed to prove that the defendants caused the decedent's death. We note that the defendants did address the causation issue both at trial and in their briefs. *Carmon v. Lubrizol*, 17 F.3d 791, 794 (5th Cir. 1994) (this Court liberally construes briefs in determining issues presented for review). Moreover, we may affirm the district court's decision on any grounds supported by the record. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 246 F.3d 507, 511 (5th Cir. 2001). The petitioner also argues that our holding is flawed because it does not explain why she was not allowed to recover for her own pain and suffering. The petitioner is correct that one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action. The petitioner, however, failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the petitioner's rights.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit
Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Supreme Court, U.S.
FILED
MAY 9 - 2003
OFFICE OF THE CLERK

No. 02-1311

In the

Supreme Court of the United States

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips, Deceased,

Petitioner,

v.

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMER, M.D., individually;
JOHN BEARRY, M.D., individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MONROE COUNTY, MISSISSIPPI

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QUESTION PRESENTED

Whether the refusal of the United States Court of Appeals for the Fifth Circuit to extend the "loss of chance" doctrine of causation developed at common law for medical malpractice actions to this wrongful death action brought under 42 U.S.C. § 1983 was error.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 02-1311

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

Petitioner,

versus

MONROE COUNTY, MISSISSIPPI; CHARLES FARMER, M.D., individually; JOHN BEARRY, M.D., individually,

Respondents

Respondent Monroe County, Mississippi respectfully requests that this Court deny the Petition for Writ of Certiorari to review the United States Court of Appeals for the Fifth Circuit's affirmance of the underlying case.

OPINIONS AND ORDERS BELOW

The May 9, 2001, opinion and judgment and order of the United States District Court for the Northern District of Mississippi, dismissing the underlying case on motion for judgment as a matter of law at the conclusion of the Petitioner's case, are reported at 143 F.Supp.2d 663 (N.D. Miss. 2001) and reproduced in the Petition for Writ of Certiorari at Appendix B and Appendix C, respectively. The October 28, 2002, decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment is reported at 311

F.3d 369 (5th Cir. 2002) and reproduced in the Petition for Writ of Certiorari at Appendix A. The November 7, 2002, petition for rehearing to the United States Court of Appeals for the Fifth Circuit is unreported and reproduced in the Respondent's Appendix. The December 9, 2002, order of the United States Court of Appeals for the Fifth Circuit denying rehearing is reported at 311 F.3d 369 (5th Cir. 2002) and reproduced in the Petition for Writ of Certiorari at Appendix D.

ADDITIONAL STATUTES INVOLVED

Miss. Code Ann. § 91-7-233 (Rev. 1994) provides:

> Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. They shall also be liable to be sued in any court in any personal action which might have been maintained against the deceased.

Miss. Code Ann. § 11-7-13 (Supp. 2002) provides:

> Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person shall be caused by the breach of any warranty, express or implied, of the

purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its

merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may assert or maintain a claim for any breach of expressed warranty or for any breach of implied warranty. A wrongful death action may be maintained or asserted for strict liability in tort or for any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased, or by all interested parties, such party or parties

may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children,

nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting parent or adopting parents surviving their deceased adopted child, just as if the child were theirs by the full blood and had been

born to the adopting parents in lawful wedlock.

STATEMENT OF THE CASE

Petitioner filed her complaint on behalf of the wrongful death beneficiaries[1] of Jonathan Phillips, claiming that "[t]he death of Jonathan Phillips was directly and proximately caused by the failure of Monroe County, Mississippi, to have in place procedures and policies to provide needed medical care, in violation of the Eighth Amendment Cruel and Inhuman Punishment Clause of the United States Constitution" made actionable through 42 U.S.C. § 1983. R. 1-3.[2] At the conclusion of Petitioner's case,[3] Respondents moved

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[1] Mississippi's Wrongful Death Statute, Miss. Code Ann. § 11-7-13 (Supp. 2002), creates a new and independent cause of action in favor of the beneficiaries named therein. *Estate of Jones v. Howell*, 687 So.2d 1171, 1178 (Miss. 1996).

[2] Petitioner's Amended Complaint named Respondents Dr. Charles Farmer and Dr. John Bearry as additional defendants. R. 177-87.

[3] Petitioner's statement of the case is misleading in a number of respects. First, to the extent that Petitioner implies (Petition at 5) that cancer spread to the decedent's brain between June 29, 1998 and July 18, 1998, due to the absence of chemotherapy in that timeframe, the record is undisputed that cancer was existing in decedent's brain for at least six months prior to his death. T. 351-52, 379; Pet. App. 8. Second, to the extent Petitioner implies that the State of Mississippi Department of Corrections had no capacity to provide chemotherapy (*see* Petition at 4-5), the record reflects that although there was no chemotherapy available at the Parchman facility or the Rankin County facility, there was an agreement between the Mississippi Department of Corrections and the University Medical Center in Jackson, Mississippi, to provide treatment, and all Department of Corrections' inmates with cancer were treated at University Medical Center. T. 353-54. Finally, as to Petitioner's contention that the decedent was transferred without

for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, arguing, *inter alia*, that Petitioner failed to establish any causal connection between the alleged acts and omissions of Respondents and the death of Jonathan Phillips. T. 470-72.

In response, Petitioner conceded "that there's been no proof of proximate cause, that is, that he would have survived." T. 482; *see also* T. 487-88 ("substantial overwhelming evidence . . . probably . . . indicates" no causal connection between failure to provide chemotherapy on June 29 and Jonathan Phillips's death). Admitting that she had no § 1983 case on point and citing a medical malpractice case regarding loss of chance of survival,[4] Petitioner contended that damages

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assurance that the state had available the capability of providing inmates with chemotherapy (Petition at 4), the record reflects that the Monroe County Sheriff's Department contacted the office of Dr. John Bearry, the Medical Director at Parchman State Correctional Facility, and explained that they had an inmate with recurring cancer who needed chemotherapy. T. 283-84, 293, 398-99. Dr. Bearry's office instructed the Sheriff's Department to transport the decedent to the state's facility in Rankin County where he would receive treatment. T. 283-84; Pet. App. 3. It was the chief deputy's understanding that treatment would be rendered that day or the next day. T. 285-86.

[4] Petitioner admitted that her suit against the Respondent physicians was not one for medical malpractice. T. 483. Petitioner's argument for "loss of chance" is based upon the testimony of Jonathan Phillips's treating physician, Dr. Julian Hill, of "[p]erhaps a 30 to 40 percent chance that he would have had some temporary remission of his cancer with further conventional chemotherapy of the type that I had planned to administer for him." T. 221. It is clear, however, that Dr. Hill's testimony was based upon "Jonathan's condition and his prognosis at that point," that is, at the time Dr. Hill set up the chemotherapy treatments, being June 25. T. 220. Petitioner admitted that at the time he recommended chemotherapy, Dr. Hill had no evidence that the cancer had already metastasized in Jonathan Phillips's brain. T. 490.

for mental anxiety resulting from Respondents' alleged failure to provide medical treatment should be available. T. 482-84. The district court granted judgment as a matter of law to Respondents. T. 499-501; Pet. App. B.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed due to Petitioner's "fail[ure] to prove the necessary causal link between the Decedent's death and the acts or omissions of the [Respondents.]" Pet. App. 2. The court rejected Petitioner's contention that it was unnecessary for her to prove that chemotherapy would have saved the decedent's life. First, the court explained that had Petitioner brought the suit as a survival action, "the causation analysis would be different because that type of claim redresses any constitutional injuries suffered by the Decedent *before* his death." The court of appeals "carefully reviewed the record for any evidence that this suit was brought as a survival action" and concluded that while the record was "somewhat ambiguous in this regard," Petitioner never referred to herself as the personal representative of the decedent, a requirement for a survival action under Mississippi law. Pet. App. 6 n.1, App. 9. Second, the court of appeals "decline[ed] to expand the 'loss of chance' doctrine beyond its normal context of medical malpractice." Pet. App. 10.

In the original opinion, the court of appeals noted that Petitioner did not allege "that her constitutional rights were violated." Pet. App. 5-6. On petition for rehearing, the court explained that while one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action, "[P]etitioner, . . . failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the [P]etitioner's rights." Pet. App. 26.

The Petition for Writ of Certiorari challenges the appellate court's refusal to adopt the "loss of chance" doctrine and to ignore Petitioner's failure to bring either an individual action or survival action.

REASONS FOR DENYING THE WRIT

A. The Petition is fundamentally flawed.

The Petition is fundamentally flawed in two respects. First, the Petition fails to recognize the nature of and distinction between survivor and wrongful death actions. At common law, a personal claim was extinguished upon the death of either the injured party or the alleged wrongdoer. *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978). Further, damages were not recoverable in tort by anyone for the death of a human being. *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344-45 (1937). To ameliorate the harshness of these common law rules, statutory survivor and wrongful death actions were enacted. *See Robertson*, 436 U.S. at 589 (survivor statutes); *Van Beeck*, 300 U.S. at 344 (wrongful death statutes). In *Van Beeck*, the Court recognized:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death."

Van Beeck, 300 U.S. at 347 (quoting *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U.S. 648, 658 (1915) (discussing the Employers' Liability Act (April 22, 1908, chap. 149, §1, 35 Stat. at L. 65, 45 U.S.C.A. § 51, as amended April 5, 1910, chap. 143, § 2, 36 Stat. at L. 291, 45 U.S.C.A. § 59))).

In arguing, on the one hand, that the court of appeals "refus[ed] to apply the common law principle that the loss of a chance for survival is actionable" (Petition at 8) and arguing, on the other hand, that the court of appeals "decide[ed] the issue by looking to hypertechnical state law distinctions between 'survivorship' and wrongful death actions" (Petition at 13), the Petition is fundamentally flawed. Without the "hypertechnical" state law statutes, the common law would bar or abate the action altogether.

Second, the Petition confuses the causation issue in two respects. The court of appeals recognized that Petitioner's references to "the fright and anxiety" both she and the deceased suffered because of the delay in chemotherapy, "confuse . . . the causation issue." The court stated that had Petitioner brought a survival action, damages for the decedent's physical suffering and mental anxiety as a result of the alleged deprivation of medical care "would have been appropriate." In her wrongful death action, however, "no damages are available until the plaintiff has cleared the causation hurdle." Pet. App. 9.

Further, Petitioner argues that the court of appeals was required by *Robertson* to apply the common law "loss of chance" doctrine of diminished causality. Petition at 7-9.[5] Petitioner assumes, without citation of

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[5] In *Bach v. Trident Steamship Co.*, 920 F.2d 322 (5th Cir. 1991), the United States Court of Appeals for the Fifth Circuit explained the doctrine as follows: "Under this doctrine, which as far as we can

authority, that the decision as to causation is governed by 42 U.S.C. § 1988. This statute instructs that when federal law is "'deficient in the provisions necessary to furnish suitable remedies and punish offenses against law,'" the court must "turn to 'the common law, as modified and changed by the constitution and statutes of the [forum] State.'" *Robertson*, 436 U.S. at 585 n. 1, 588 (quoting 42 U.S.C. § 1988) (brackets by the Court)). *Robertson* looked to the survival statute of the forum state because "one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'" *Robertson*, 436 U.S. at 589 (quoting *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973)).

Petitioner has cited no authority that federal law relating to causation is "deficient." Section 1983 provides: "Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. There is, thus, a "causation requirement set out on the face of § 1983." *St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality opinion). Additionally, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). In *Collins v. Harker Heights*, 503 U.S. 115 (1992), the Court stated that "proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) *whether plaintiff's harm was caused*

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tell, has been confined to medical malpractice cases, plaintiffs who cannot meet the ordinary standards of causation are allowed to recover for negligent conduct that decreases their chances of survival." 920 F.2d at 327 (declining to apply doctrine "well beyond the context in which it has been developed").

by a constitutional violation, and (2) if so, whether the city is responsible for that violation." 503 U.S. at 120 (emphasis added). In *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), the Court emphasized that that "whatever the constitutional basis for § 1983 liability, such damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.'" 477 U.S. at 309 (quoting *Carey v. Piphus*, 435 U.S. 247, 265 (1978) (emphasis and brackets by *Memphis Community School Dist.* Court)). Death may be "too remote a consequence" of a challenged action to hold one "responsible under the federal civil rights law. Although a § 1983 claim has been described as 'a species of tort liability,' it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." *Martinez v. California*, 444 U.S. 277, 285 (1980) (citation omitted; quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). The causation requirement arises from § 1983 itself. Petitioner has cited no authority that the court of appeals was required to look to § 1988 incorporation of forum state law to interpret the causation requirement.

B. The Fifth Circuit Court of Appeals Clearly Followed *Robertson v. Wegmann*

Petitioner's contention that the court of appeals' refusal to expand the "loss of chance" doctrine constitutes disregard for this Court's decision in *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978)) is without merit. *Robertson* held, "Under § 1988 . . . *state statutory law*, modifying the common law, *provides the principal reference point in determining survival of civil rights actions*, subject to the important proviso that state law may not be applied when it is

'inconsistent with the Constitution and laws of the United States.'" *Robertson*, 436 U.S. at 589-90 (quoting 42 U.S.C. § 1988) (emphasis added)). Mississippi statutory law is exactly what the court of appeals applied to determine that Petitioner had not brought a survival action in the instant case. Section 91-7-233 of the Mississippi Code provides that a personal action survives to the "executors, administrators, and temporary administrators" of the deceased. Miss. Code Ann. § 91-7-233 (Rev. 1994). The court of appeals determined that Petitioner "does not seek relief as the personal representative of the Decedent's estate" and ruled that "without alleging the appropriate legal status, P[etitioner] could not have brought a survival action." Pet. App. 6 & n.1. Petitioner has cited no authority that requiring a survival action to be maintained by the personal representative of the deceased is "inconsistent with the Constitution and laws of the United States." In *Robertson*, the Court noted that, "For those actions that do not abate automatically on the plaintiff's death, most States apparently allow the personal representative of the deceased to be substituted as plaintiff." *Robertson*, 436 U.S. at 591 n.7. The court of appeals clearly followed *Robertson* in the instant case.

As discussed above, Petitioner has cited no authority that issues of causation are to be analyzed under *Robertson*'s § 1988 analysis. However, whether under that analysis or under an interpretation of § 1983's causation requirement itself, Petitioner has cited no authority which would require expansion of the "loss of chance doctrine" to the instant case. Petitioner admitted to the district court that she had no § 1983 case supporting her "loss of chance" theory. T. 482-84.[6] The

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[6] In fact, Petitioner prefaced the argument, "Your Honor, there's [sic] interesting question that I have not been able to find any 1983 law on." T. 482.

court of appeals "decline[ed] to expand the 'loss of chance' doctrine "beyond its normal context of medical malpractice." Pet. App. 10 (citing *Bach v. Trident Steamship Co.*, *supra*).

In the event the common law of the forum state were applicable, Mississippi clearly applies the doctrine only to medical malpractice actions. In *Clayton v. Thompson*, 475 So.2d 439 (Miss. 1985), recognizing that "our approach to the requirement of causation in medical malpractice cases necessarily differs from that employed in most other tort contexts," the Mississippi Supreme Court adopted Mississippi's version of the doctrine as follows: "[r]ecovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." The court held that "Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.'" 475 So. 2d at 445. The "clear common law principle" advanced by Petitioner "that one is subjected to liability whenever his unlawful actions diminish the chances of the decedent's survival," (Petition at 7) was, thus, clearly rejected by the *Clayton* court.

In *Ladner v. Campbell*, 515 So.2d 882 (1987), the Mississippi Supreme Court explained:

> Some courts have held that the plaintiff has to supply evidence that proper treatment would have provided the patient "with a greater than fifty (50) percent chance of a better result than was in fact obtained." 54 A.L.R.4th 10 § 2[a]. The *Clayton* decision clearly placed the Mississippi rule in alignment with these

> jurisdictions, and rejected the notion that a mere "better result absent malpractice" would meet the requirements of causal connection.

Ladner, 515 So.2d at 889 (quoting John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 10 (1987) § 2[a]). Petitioner's quotation from the same annotation that "Courts 'are united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice'" glaringly omits the prefatory language "those adopting the alternative view". *Compare* Petition at 8 (quoting 54 A.L.R. 4th at 19) *with* 54 A.L.R. 4th at 19. A more thorough reading of the annotation reflects that the position advanced by Petitioner is "[a]n alternative view" among "[d]iverging positions." 54 A.L.R. 4th at 18-19. The annotation identifies Mississippi as being a jurisdiction which requires "greater than 50 percent chance of better result." *See* 54 A.L.R. 4th at 30-31. Contrary to Petitioner's contention, there is no "clear common law principle" (Petition at 7) even in the area of medical malpractice.

Petitioner's contention that the court of appeals' refusal to expand the "loss of chance" doctrine disregards *Robertson* is without merit.

C. The Conflict Among the Circuits Identified by Petitioner is Irrelevant to the Case at Bar

While there is a conflict among the United States Circuit Courts of Appeals regarding whether recovery for wrongful death actions is appropriate under § 1983, that conflict is irrelevant to the case at bar. The Court

of Appeals for the Fifth Circuit "ha[s] consistently allowed" such recovery (Pet. App. 7) and would have allowed it in the case at bar had Petitioner proved the essential elements of her case. Petitioner has received the benefit of the conflict among the circuits; she has not identified which circuit approach, if any, would allow her to recover under the facts of this case.[7] Petitioner did not raise in the court below any contention that the approach of a different circuit court of appeals would allow her recovery. *See* Resp. App. 1a-25a.

Long before *Robertson*, the United States Court of Appeals for the Fifth Circuit recognized that "federal law is not suitable, i.e., sufficient, since it leaves a gap for death in a substantive policy making no distinction between violent injuries and violent death" and that "state law is to be used to the extent that it is currently available to overcome these deficiencies." *See Brazier v. Cherry*, 293 F.2d 401, 408 (5th Cir. 1961). "To make the policy of the Civil Rights Statutes fully effectual," the Fifth Circuit Court of Appeals incorporates both state survival and wrongful death actions pursuant to § 1988. 293 F.2d at 409.

Other circuit courts decline to incorporate state wrongful death statutes for a variety of reasons. In *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984), the Court of Appeals for the Sixth Circuit determined that since § 1983 creates a "personal [cause of] action cognizable only by the party whose civil rights had been violated," state wrongful death actions which create new and separate claims or causes of action for damages in favor

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[7] Notably, Petitioner has not identified any conflict among the circuits with respect to the "loss of chance" doctrine in § 1983 death cases. Petitioner admitted to the district court that she had no § 1983 support for her position. T. 482-84.

of the persons identified in the statute, are not "equivalent" and should not be incorporated into § 1983. 739 F.2d at 242-45 (holding that since state wrongful death action inappropriate under § 1983, and state survival action by itself insufficient to champion civil rights of deceased, "a personal cause of action, may be pursued in the name of the decedent's personal representative, as defined by the law of the forum jurisdiction").

The Tenth Circuit Court of Appeals disagrees that "the 'new' cause of action theory" warrants rejection of state wrongful death remedies as appropriate to vindicate § 1983 violations when death results, but believes that defining § 1983 remedies in terms of state survival action, supplemented by state wrongful death act, "place[s] into the hands of the state the decision as to allocation of the recovery in a § 1983 case, and, indeed, whether there can be any recovery at all." *Berry v. City of Muskogee*, 900 F.2d 1489, 1504-06 (10th Cir. 1990). The Tenth Circuit determined that "[a]pplication of state law, at least in some instances, will be inconsistent with the predominance of the federal interest." 900 F.2d at 1506-07 (fashioning instead "a federal remedy to be applied to § 1983 death cases . . . . a survival action, brought by the estate of the deceased victim" making available "sufficient damages to serve the deterrent function central to the purpose of § 1983").

In *Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001), the United States Court of Appeals for the Eighth Circuit determined that allowing the measure of § 1983 damages to be entirely defined by the language of the Missouri wrongful death statute "would impermissibly broaden the types of injuries for which Congress intended recovery to be available under § 1983's authorization of liability 'to the party injured.'" 253 F.3d

at 1057-58, 1063-64 (looking to Missouri wrongful death statute to determine standing for § 1983 suit where state survivorship statute and wrongful death statute were "mutually antagonistic," the state survival statute applying only when injury did not cause death; declining to allow plaintiff to "shoehorn recovery" available under state wrongful death action into recovery she may receive under § 1983 for decedent's injuries).

In *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985), the United States Court of Appeals for the Seventh Circuit held that where the state wrongful death scheme denies recovery for loss of life, it "effectively calls for abatement of [decedent's] constitutional claim" and is inconsistent with the deterrent policy of § 1983. 769 F.2d at 1189-90 (finding that "[s]uch restrictive state laws must give way to federal common law rules that permit recovery" and allowing "the estate to recover damages").

Petitioner has not made any claim that the Fifth Circuit's incorporation of the Mississippi wrongful death statute is in any way inconsistent with § 1983 policy. In fact, Petitioner brought the instant case on behalf of the wrongful death beneficiaries of Jonathan Phillips. The case was brought, tried and lost as a wrongful death action. Any detriment to Petitioner is not the result of the conflict among the circuit courts of appeal but the result of Petitioner's failure to prove the essential elements of her claim. The Fifth Circuit did not say that Petitioner could not bring a wrongful death case, but that she had failed to prove it.

Further, three of the four circuit court decisions discussed above which adopted a "federal" remedy, gave that remedy to the estate of the deceased. *See Jaco*,

Berry and *Bass*, *supra*.[8] As noted previously, Petitioner has never claimed to be the personal representative of the decedent's estate; had she done so, the Fifth Circuit would have found that she stated a survival claim under Mississippi law. *See* Pet. App. 6 & n.1. Petitioner's failure to bring the action as the personal representative of the decedent's estate bars not only her survival claim under Mississippi law but also would prevent her recovery under the Sixth, Tenth and Seventh Circuit approaches. The conflict among the circuits is irrelevant to the instant case.

D. Petitioner's Rule 17(a) "Real Party in Interest" Argument Was Not Made Below and Is Without Merit

The "real party in interest" argument advanced in the Petition for Writ of Certiorari was not raised in the court of appeals (*see* Resp. App. 1a-25a) and should not be addressed to this Court in the first instance.

Moreover, while Rule 17(a) of the Federal Rules of Civil Procedure requires that an action "be prosecuted in the name of the real party in interest," the rule does not identify the "real party in interest." The rule does, however, specifically refer to an "executor" or "administrator." *See* Fed. R. Civ. Pro. 17(a). With respect to the survival of claims under § 1983, *Robertson* held that "*state statutory law*, modifying the common law, *provides the principal reference point in determining survival of civil rights actions.*" 436 U.S. at 589-90 (emphasis added)). Section 91-7-233 of the Mississippi Code provides that a personal action survives to the "executors, administrators, and

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[8] The only case which did not do so, *Andrews*, *supra*, based standing upon state law.

temporary administrators" of the deceased. Miss. Code Ann. § 91-7-233 (Rev. 1994). The court of appeals "carefully reviewed the record for any evidence that this suit was brought as a survival action" and determined that since Petitioner never referred to herself as the personal representative of the decedent's estate, she could not have brought a survival claim. Pet. App. 6 & n.1. This reasoning is in accord with *Robertson's* identification of state statutory law as the "principal reference point in determining survival of civil rights actions." The court of appeals did not say that no one could bring an action for the mental suffering Jonathan Phillips allegedly experienced prior to his death, but that Petitioner, not being the personal representative of the estate, could not do so.

Further, while the court of appeals recognized "that one whose own constitutional rights have been violated by actions directed at another may maintain her own § 1983 action," the court determined that Petitioner "failed to allege which, if any, of her own constitutional rights were violated. Nor, upon review, could we identify any violation of the petitioner's rights." Pet. App. 12. The Petition for Writ of Certiorari does not identify which constitutional rights of Petitioner the Respondent is alleged to have violated.[9] While the Petitioner would be the "real party in interest" to assert a claim for violation of her own constitutional rights, the court of appeals determined that she had brought no such claim in the instant case.

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[9] Petitioner's reference to authorities which allow one to "sue for violations of his own rights in federal court where the unconstitutional killing of another has injured him" (Petition at 13) are clearly inapposite. The court of appeals determined there to be no causal connection between the alleged acts or omissions of Respondents and the death of Jonathan Phillips. Pet. App. 2. There was no "unconstitutional killing" in the case at bar.

CONCLUSION

The Petition for Writ of Certiorari is without merit. While there is a conflict among the circuits regarding incorporation of wrongful death actions into § 1983, that conflict is irrelevant to the case at bar. Moreover, there is no conflict among the circuits regarding "loss of chance" in wrongful death § 1983 cases. Petitioner admitted to the district court that she had no § 1983 authority to support her contention; she has cited none in the Petition. Therefore, the Petition for Writ of Certiorari should be denied.

DATED: May 9, 2003

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,

PLAINTIFF/APPELLANT,

VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
JOHN BEARRY, individually,

DEFENDANTS/APPELLEES.

PETITION FOR REHEARING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION
Glen H. Davidson, United States District Judge

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UNITED STATES COURT OF APPEALS
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VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
JOHN BEARRY, individually,
DEFENDANTS/APPELLEES.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Sandra Phillips, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal pursuant to Rule 13.6.1 of the United States Court of Appeals for the Fifth Circuit.

A. Sandra Phillips, Appellant;

B. Jim Waide, Counsel for Appellant;

3. Kristy L. Bennett, Counsel for Appellant;

4 Waide & Associates, Counsel for Appellant;

5. Monroe County, Mississippi, Appellee;

6. Dr. Charles Farmer, Appellee;

7. John Bearry, Appellee;

8. Bradley Dillard, Counsel for Appellee Monroe County, Mississippi;

9. John L. Clay, Counsel for Appellees Charles Farmer and John Bearry; and

10. Leonard Vincent, Counsel for Appellees Charles Farmer and John Bearry.

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips
PLAINTIFF/APPELLANT,

VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
JOHN BEARRY, individually,
DEFENDANTS/APPELLEES.

STATEMENT OF THE ISSUES

1. Whether the Court erred in deciding to apply state law and common law principles when there was no applicable federal law?

2. Whether the Court erred in applying principles of "survivorship" to deny Phillips' claim she herself suffered harm by reason of Defendants' unconstitutional acts?

COURSE OF PROCEEDINGS/FACTS

By Opinion dated October 28, 2002, this Court: (1) determined that the common law principles developed in medical malpractice cases do not apply in suits under 42 U.S.C. § 1983; and (2) held that Plaintiff cannot proceed for damages for her own pain and suffering as a result of the deprivation of medical care because this is a "wrongful death action," not a "survival" action.

This Court summarized the view which the Court must take in considering the evidence as follows:

> In other words, we must give credence to the evidence supporting the nonmovant as well as any evidence supporting the moving party that is uncontradicted, unimpeached, and not attributable to interested witnesses.

Slip Op., p. 2, *citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2002).

So viewing the facts, they may be simply stated.

On June 24, 1998, while Jonathan Phillips was in the Monroe County Jail, the Monroe County Sheriff's Department received a note from the Decedent's cancer physician, Dr. Hill, that "Jonathan has recurrent testes cancer and needs to receive salvage chemotherapy - preferably high-dose therapy ..." R. Vol. 4, p. 20-21.

Jonathan's aunt, Diane Hunt, discussed transporting Jonathan to Tupelo, Mississippi for chemotherapy with Monroe County Chief Deputy Burks. The chemotherapy was scheduled for June 29, 1998. *Id.* at 22-23. The deputy declined to have Jonathan transported to Tupelo for the chemotherapy because he

"didn't have the manpower," *Id.* at 23, and even refused to allow Hunt, herself a deputy, to transport him. *Id.* at 22-23.

Instead of taking Jonathan for the scheduled chemotherapy on June 29, 1998, and in order to save the county expense of having to pay for the chemotherapy treatment, the county contacted employees of the state correctional facility to persuade them to take Jonathan off its hands. The county arranged for Jonathan to be transported to the state correctional facility without any assurance that there could be any immediate treatment as Jonathan needed. See R. Vol. 6, pp. 395-96, 401.

On June 29, when Jonathan was supposed to be having his chemotherapy in Tupelo, he was instead transported to the State Department of Corrections facility in Rankin County, Mississippi. Had Rankin County officers been told of the need for immediate chemotherapy, they would not have accepted Jonathan for treatment. R. Vol. 4, p. 93.

In fact, the state correctional facility had no available means to afford immediate chemotherapy treatment, *Id.* at 117-118, and according to state officials, no one would have told the Monroe County Sheriff's Department that chemotherapy could be immediately administered.

Jonathan, upon learning that he was not going to receive the chemotherapy, was "terrified." *Id.* at 429. Similarly, Jonathan's mother "fell apart" when informed there was no immediate chemotherapy treatment available. *Id.*

No chemotherapy treatment was provided to Jonathan and he died on July 18, 1998, never having

received the chemotherapy treatment that was supposed to have begun in Tupelo, Mississippi on June 29, 1998.

District Judge Davidson directed a verdict for the Defendants on the ground that Plaintiff had not produced the necessary proof to demonstrate Defendants were deliberately indifferent to Jonathan's known medical needs. R. Vol. 6, pp. 501-02.

This Court affirmed by finding Plaintiff could not recover for wrongful death because she could not prove that Jonathan would have survived even had the chemotherapy treatment been provided as directed. Also, this Court found Jonathan and his family could not recover for the pain and fright they suffered because this was a "wrongful death action," and not a survival action. Slip Op., p. 4.

ARGUMENT I.

THE COURT ERRED BY FAILING TO APPLY THE COMMON LAW PRINCIPLE THAT DIMINISHING A PATIENT'S CHANCE FOR SURVIVAL IS A LEGAL CAUSE OF INJURY.

This Court would not permit Plaintiff's wrongful death claim to go to the jury because it concluded that the evidence did not demonstrate that immediate chemotherapy would have saved Jonathan's life. This Court noted that Dr. Hill (the Tupelo physician) further admitted at trial that "even with the salvage chemotherapy he had prescribed, the Decedent could, at most, have hoped for a thirty to forty percent chance of some temporary remission of his cancer..." Slip Op., p. 3.

Thus, this Court rejected Plaintiff's argument that she "need only prove the defendants' actions increased the Decedent's risk of death due to cancer." Slip Op., p. 4. Dr. Hill's testimony that the chemotherapy would have increased by "thirty to forty percent" the chance of a temporary remission of cancer, Slip Op., p. 3, was, thus, insufficient for liability. According to this Court: "In sum, there is no evidence in the record of any possible medical treatment that Monroe County or the individual defendants could have provided to save the life of the Decedent." Slip Op., p. 4. Plaintiff's claim that diminishing the chances of surviving by refusing the chemotherapy was rejected based on this Court's holding that: "the supporting cases ... relate to medical malpractice suits and are not relevant here." Slip Op., p. 4.

42 U.S.C. § 1988(a) provides that whenever civil rights statutes are "deficient" in not providing "suitable remedies," a court is to apply the "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,..."

There is nothing in 42 U.S.C. § 1983 which states whether or not Plaintiff's proof that the Defendants' actions decreased the chances of survival is sufficient proof of causation. However, there exists an analogous common law principle developed in the context of medical malpractice actions. In these common law actions, it has been repeatedly held that a medical doctor is subjected to liability whenever his improper actions diminish the chances of the decedent to survive. See generally Annotation, *Medical Malpractice: "Loss of Chance Causality"*, 54 ALR 4th 19 (1987). As explained in *Boburka v. Adcock*, 979 F.2d 424 (6th Cir. 1992),

"[t]his theory allows a medical malpractice plaintiff to recover if he produces evidence that the defendant physician's malpractice reduced the patient's chances for a better outcome, even if the chance of the better outcome without the physician's negligence was less than fifty percent." 979 F.2d at 429. Courts "are united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice." John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 19 (1987). For example, in *Herskovits v. Group Health Cooperative*, 99 Wash.2d 609, 664 P.2d 474 (Wash.1983), the Washington Supreme Court held that the reduction of a patient's chance for survival from thirty-nine percent to twenty-five percent due to a negligent failure to diagnose his cancer was sufficient proof of causation for the case to go to a jury. *See also James v. United States*, 483 F.Supp. 581, 587 (N.D. Cal.1980) ("[n]o matter how small that chance may have been–and its magnitude cannot be ascertained–no one can say that the chance of prolonging one's life or decreasing suffering is valueless").

There being nothing in 42 U.S.C. § 1983 dealing with whether denying the chance of prolonging life is actionable, this Court must look to the common law to find the gage. *Robertson v. Wegmann*, 436 U.S. 584 (1978) held that since 42 U.S.C. § 1983 has no law on whether a 1983 action survives the death of the plaintiff, the court looks to state law for that decision:

> As both courts below held, and as both parties here have assumed, the decision as to the applicable survivorship rule is governed by 42 U.S.C. §§ 1988. This statute recognizes that in certain areas "federal law

> is unsuited or insufficient 'to furnish suitable remedies' "; federal law simply does not "cover every issue that may arise in the context of a federal civil rights action." *Moor v. County of Alameda*, 411 U.S. 693, 703, 702, 93 S.Ct. 1785, 1792, 36 L.Ed.2d 596 (1973), quoting 42 U.S.C. §§ 1988. When federal law is thus "deficient," §§ 1988 instructs us to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," as long as these are "not inconsistent with the Constitution and laws of the United States." See n. 1, *supra*.

436 U.S. at 588-89[1].

Having found 42 U.S.C. § 1983 did not address the issue, and having found there was an analogous principle of state law, the Supreme Court held that 42 U.S.C. § 1988(a) required application of state law.

In this case, there is no section 1983 rule with respect to whether proving that the willful indifference of a tort feasor, decreasing the chances of a civil rights' victim to survive is actionable. There is, however, an

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[1] Consistent with *Robertson, supra*, this Court has normally held that state law controls wrongful death issues. *See Delesma v. City of Dallas*, 770 F.2d 1334 (5th Cir. 1985); *Granstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); and the leading case, *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961). By refusing to follow applicable common law on the chance of survival issue, this Court acts inconsistently with these much earlier Fifth Circuit decisions.

analogous rule of the common law. This rule of the common law, developed in medical malpractice cases, is that decreasing one's chances to survive is sufficient to fasten liability. 42 U.S.C. § 1988(a), thus, dictates applicability of this rule.

This Court cited no reason for not applying 42 U.S.C. § 1988(a) except the fact that in a Jones Act case, *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322 (5th Cir. 1991), did not apply this common law medical malpractice rule. The Jones Act, however, has no provision such as 42 U.S.C. § 1988, incorporating a state common law rule of decision. *Bach* is, therefore, irrelevant and is not authority to disregard 42 U.S.C. § 1988(a).

By deciding not to apply the common law rule, without citing to 42 U.S.C. § 1988(a), this Court has acted inconsistently with the Supreme Court's teaching in *Robertson, supra*, as well as the express language of 42 U.S.C. § 1988(a). *See also, Burnett v. Grattan*, 468 U.S. 42 (1984) (where federal laws do not provide an applicable rule, courts must apply state law rule of decision unless it is "inconsistent with federal law").

ARGUMENT II.

THIS COURT ERRED IN *SUA SPONTE* RULING THAT PLAINTIFF COULD NOT RECOVER FOR HER OWN PAIN AND SUFFERING CAUSED BY THE DELAY IN THE CHEMOTHERAPY TREATMENTS ON THE THEORY THAT PLAINTIFF DID NOT BRING A "SURVIVAL" ACTION.

Besides ruling that Plaintiff has no claim for wrongful death because she could not prove that Jonathan

would have survived, this Court also ruled that Jonathan's and Sandra's suffering from the delay in providing chemotherapy treatment could not provide a cause of action. This ruling was made upon the theory that this action is a "wrongful death" action and not a "survivor" action, which may only be brought by an administrator. This Court explained its position in this regard in a footnote saying:

> Importantly, however, Phillips never refers to herself or any of the plaintiffs as personal representatives of the Decedent's estate, nor does she clearly assert that she is in fact the Decedent's executor or administrator. Under Mississippi's general survivorship statute, only executors, administrators, and temporary administrators may bring a survival action. Miss.Code Ann. § 91-7-233 (1994).

Slip Op., p. 3, fn 1.

Thus, while holding state common law principles of medical malpractice not applicable, the Court incorporates the principles of state law distinguishing between "survival" actions and wrongful death actions, and disallows Plaintiff's claim for the suffering suffered by Jonathan and his mother on the grounds that this is a "survivor" action, not a wrongful death action.

There are several fallacies in this Court's holding. In the first place, the distinction between "survival" actions and "wrongful death" actions was never raised by any of the Defendants. This Court does not raise for the parties issues which they did not raise on their own. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) ("It is the general rule ... that a

federal appellate court does not consider an issue not passed on below"). A party has presented an issue in the trial court if that party has raised it in either the pleadings or the pretrial order, or if the parties have tried the issue by consent. *See Myrick v. City of Dallas*, 810 F.2d 1382, 1386 (5th Cir.1987) (holding a claim not properly raised if not in pleadings, pretrial order, or evidence presented); *Laird v. Shell Oil Co.*, 770 F.2d 508, 510-11 (5th Cir.1985) (refusing to consider an issue not raised in the pleadings, pretrial order, or trial evidence). The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised. *See Simon v. United States*, 891 F.2d 1154, 1158 (5th Cir.1990) (affirming district court's finding that a party had waived an issue because the record did not put opponent or court on notice). For the Court to raise a defense for a party which the party has not raised for itself raises grave concerns about judicial impartiality. This represents the Court making arguments for one of the parties rather than acting as a judicial adjudicator of the arguments made. Since the Defendants never raised this argument, Plaintiff never had the opportunity to respond to it or to argue about whether the issue was one of "procedure" which was governed by the Federal Rules of Civil Procedure, rather than one of substantive law which would be governed by state law. *See Siroonian v. Textron, Inc.*, 844 F.2d 289, 292 (5th Cir. 1988); *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 309-10 (5th Cir. 1984); *Owens v. International Paper Co.*, 528 F.2d 606, 609 (5th Cir. 1976).

However, even assuming that the distinction between survivorship and wrongful death would have provided a defense to any claim on Jonathan's behalf for Jonathan's suffering and fright from not receiving chemotherapy, this does not explain why the Court rejected the claims of Sandra Phillips (Jonathan's mother)

for the pain and fright she has suffered as a result of the refusal to provide her son chemotherapy treatment. Without objection from Defendants, there was compelling testimony that Jonathan's mother suffered fright as a result of the refusal to give Jonathan chemotherapy treatment. As testified by Jonathan's sister, Michelle Snodder: "She was at the point of a nervous breakdown ... she would sit in her bedroom and squall all the time because there was nothing else she could do." T.T., p. 249.

Mrs. Phillips herself testified about the suffering she (Mrs. Sandra Phillips) underwent as a result of the failure to provide the chemotherapy. She testified:

> I knew if my son didn't get it [chemotherapy], he was going to die. I mean an every minute thing, trying to figure out who to talk to, how to get him his chemo. I didn't want my son to die ... I couldn't sleep.

T.T., pp. 132-33.

Therefore, assuming that there could be no recovery for Jonathan's pain and suffering because this action was brought as a "wrongful death action" rather than a "survival" action, this does not explain why this Court did not allow Sandra Phillips to recover for her own pain and suffering. *Carey v. Piphus*, 435 U.S. 247 (1978), held that one who suffers mental injury because of violation of a constitutional right has a cause of action for damages under 42 U.S.C. § 1983. Here, Sandra Phillips made just such a claim and testified without objection in support of it. This Court's finding, on its own motion, that this was a wrongful death action, does not address Sandra

Phillips' claim for her own fright and suffering.[2]

CONCLUSION

This Court should reverse. It should apply 42 U.S.C. § 1988(a) to allow the wrongful death claim to be presented to a jury. It should allow Sandra Phillips to proceed on her claims for her own pain and suffering caused by the refusal to provide her son chemotherapy.

Respectfully Submitted,

BY: _____
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[2] Many cases stand for the principle that one whose own rights have been violated by the unconstitutional killing of another may maintain his own section 1983 action. *See League of Women Voters v. Nassau Co. Board of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984); *O'Malley v. Breirley*, 477 F.2d 785, 789 (3d Cir. 1973); *Brown v. Board of Trustees*, 187 F.2d 20, 25 (5th Cir. 1951). In this case, Plaintiff was simply asserting that the refusal to provide Jonathan chemotherapy her own constitutional right was violated by causing her needless suffering. This is an application of the principle of these cases. *See also, Coggins v. Carpenter*, 468 F.Supp. 270, 282 (D.C. Pa., 1979)("a person has standing to assert claims under 42 U.S.C. §1983 if that person was aggrieved or injured by the conduct, even if that person was not the object of the conduct allegedly in violation of 42 U.S.C. § 1983").

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CERTIFICATE OF SERVICE

I, JIM WAIDE, do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document, as well as a WP 3.5 disk to:

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THIS, the _____ day of November, 2002.

_____
JIM WAIDE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 01-60425

SANDRA FAY PHILLIPS, on Behalf of the Wrongful Death Beneficiaries of Jonathan Phillips,
PLAINTIFF/APPELLANT,

VERSUS

MONROE COUNTY, MISSISSIPPI;
CHARLES FARMERS, DR., individually;
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DEFENDANTS/APPELLEES.

APPENDIX "A"*

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[* Appendix A consisted of the October 28, 2002, decision of the United States Court of Appeals for the Fifth Circuit which is reported at 311 F.3d 369 (5th Cir. 2002), and is reproduced at Pet. App. 1-12.]

CERTIFICATE OF SERVICE

I, JIM WAIDE, do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document, as well as a WP 3.5 disk to:

L. Bradley Dillard, Esq.
P. O. Box 7120
Tupelo, MS 38802

John Clay, Esq.
SAAG
P. O. Box 220
Jackson, MS 39205-0225

Leonard Vincent, Esq.
P.O. Box 38
Parchman, MS 38738

THIS, the _____ day of November, 2002.

_____
JIM WAIDE

WAIDE & ASSOCIATES, P.A.
ATTORNEYS AND COUNSELORS AT LAW

JIM WAIDE	**MAILING**	**STREET**
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Mr. Charles R. Fulbruge, III
Clerk, United States Court of Appeals
600 Camp Street, Room 109
New Orleans, LA 70130

Re: Sandra Phillips v. Monroe County, MS
No.: 01-60425

Dear Mr. Fulbruge:

Please find enclosed herein for docketing and filing the original and three (3) copies of the Plaintiff-Appellant's Petition for Rehearing in the above-styled matter, as well as a disk containing the same.

Consistent with my certificate, I have forwarded a copy of same to opposing counsel.

With kindest regards, I am

Sincerely yours,

JIM WAIDE

JDW/kd
Enclosures

cc: L. Bradley Dillard, Esq. (w/encl.)
John Clay, Esq. (w/encl.)
Leonard Vincent, Esq. (w/encl.)